THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.W.P. No. 5898 of 2003

Date of Decision: 02 -11 -2006

Ramesh Bhatia **.....Petitioner**

v.

State of Haryana and others **.....Respondents**

CORAM: HON'BLE MR.JUSTICE P.S.PATWALIA

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Present: Mr.Namit Kumar, Advocate
for the petitioner.

Mr.Ashish Kapoor, Addl.A.G., Haryana
for respondents 1 and 2.

Mr.D.K.Khanna, Advocate
for respondent No.3.

Mr.Siddharth Sanwaria, Advocate
for respondent No.4.

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P.S.PATWALIA, J.

Petitioner Ramesh Bhatia working as a Superintendent in the Tourism Department, Haryana has filed the present writ petition praying for the issuance of a writ in the nature of quo-warranto declaring the appointment of Mahesh Behal respondent No.4 as a Deputy Director in the Directorate of Tourism, Haryana, by way of transfer, as being void and illegal and for quashing the same. He has further prayed for a writ in the nature of mandamus directing the respondent-State to consider and promote him to the post of Deputy Director.

The facts leading to the filing of the present writ petition are

recapitulated hereunder:

The petitioner joined the Tourism Department of the State of Haryana as an Assistant in June, 1985. He was thereafter promoted as a Deputy Superintendent in March, 1996 and as a Superintendent on 11.8.1997. The petitioner contends that he has completed his period of probation as a Superintendent and his promotion was also approved by the Haryana Public Service Commission in April, 2001. Next promotion from the post of Superintendent is to the post of Deputy Director. The conditions of service of the latter post are governed by The Haryana Tourism Department (Group B) Service Rules, 1996 (hereinafter to be referred as, `the Rules'). Rule 9 of the Rules deals with the mode of recruitment and Rule 17 grants a power of relaxation to the Government. The relevant extract of the aforesaid Rules is as hereunder:-

"9(1) Recruitment to the Service shall be made,-

(a) in the case of Dy. Director -

(i) by promotion from amongst Project Officer or Superintendent;

(ii) by transfer of an official already in the service of the Govt. of a State or of the Govt. of India;

or

(iii) by direct appointment;

.....

17. Where the Govt. is of the opinion that it is necessary or expedient to do so, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules **with respect to any class or category of persons.**

Sr. No.	Designation of post(s)	Academic Qualifications and experience, if any, for direct appointment	Academic qualification & experience, if any, for appointment other than by direct recruitment
1.	2.	3.	4.
1.	Dy. Director	Master's degree of a recognised University	(i) Five years experience as Project Officer; or

and possesses experience of tourism or publicity or public relation or travel agency or started hotel establishment for a period of not less than 5 years.	(ii)Five years experience as Superintendent."

A reading of the above rules would show that for promotion as Deputy Director five years experience as a Superintendent is required. As per Rule 9 of the Rules, the post of Deputy Director can be filled up by promotion from the post of Project Officer or Superintendent, by transfer of an officer in the service of the Government of a State or of the Government of India or by direct recruitment.

The petitioner contends that he is working on the only post of Superintendent in the Department and is also senior to the Project Officer working in the Department. He was to complete 5 years service as Superintendent on 19.8.2002. One post of Deputy Director was lying in the Department in February, 2000. In June, 2002 the petitioner states that he came to know that the same was being filled up by appointing Shri Mahesh Behal respondent No.4 who was working as Laison Officer in the Haryana Tourism Corporation. This appointment was being made by way of transfer. The petitioner contends that as he was the senior most person in the department in the line for promotion as Deputy Director he submitted a representation in June, 2002 that he should be promoted as Deputy Director instead of appointing Shri Mahesh Behal by transfer. The petitioner pointed out that even on earlier occasions various persons had been promoted as Deputy Director by relaxing the requirement of five years experience. He cited the case of one Shri Chattar Singh, Project Officer who was promoted as Deputy Director after relaxing the clause of experience and one Shri Prem Sagar, Deputy Director who was promoted as Joint Director also after relaxing the clause of experience.

The petitioner states that in spite of his representation by an order dated 4.7.2002 Shri Mahesh Behal was appointed as a Deputy Director in the Department of Tourism, Haryana by way of transfer. This appointment was subject

to the approval of the Haryana Public Service Commission. The Commission approved the appointment by order dated 22.10.2002. Both these orders have been attached as Annexures P7 and P8 with this writ petition and the petitioner has sought quashing of the same.

A written statement has been filed on behalf of respondents 1 and 2 by the Joint Director, Tourism Department Haryana. It has been stated therein that at the time of appointment of respondent No.4 no officer within the department fulfilled the requisite experience for promotion. In so far as respondent No.4 is concerned, he had worked as Assistant Director in the Government of India for a period of three years from 1992 to 1995 and thereafter was working as a Public Relations Officer in the Haryana Tourism Corporation since March 1998. He, thus, fulfills the requisite experience of five years. However, since he was not an employee of the Government of a State or of the Government of India, he was appointed by transfer by relaxing the aforesaid condition in the exercise of powers under Rule 17 of the Rules. It is stated that respondent No.4 had made a request that he should be considered for appointment against the post of Deputy Director. The request of respondent No.4 was considered keeping in view his excellent record of service and experience and finding him eligible he had been appointed.

Respondent No.4 has filed a separate written statement. He has also pleaded that his appointment was made in accordance with the service rules. On merits respondent No.4 contends that he was already working as a Laison Officer in the Haryana Tourism Corporation having experience of 28 years service. He states that on coming to know that a post of Deputy Director in the Tourism Department was lying vacant he submitted an application for appointment on transfer basis through his parent department i.e. the Haryana Tourism Corporation. His application was forwarded to the Government by the Managing Director of the Corporation on 22.4.2002. He states that he had also sent an advance copy of the application to the Government of Haryana for consideration. His application was

considered on merits and he was appointed. He has also placed on record order dated 23.6.2004 whereby consent for absorption and option for pension scheme was granted by the Government and he was absorbed in the Tourism Department as Deputy Director with effect from 8.7.2002 subject to the result of present writ petition.

It is in the aforesaid circumstances that the petitioner has challenged the appointment of respondent No.4 as a Deputy Director by way of transfer. Mr.Namit Kumar, learned counsel for the petitioner contends that the appointment of respondent No.4 is illegal and liable to be set aside on the following grounds:-

(i) Firstly he states that respondent No.4 was ineligible for being appointed by way of transfer as he was neither in the service of the State Government nor in the service of Government of India prior to his transfer. He was rather working in the Haryana Tourism Corporation. Thus, he is ineligible as per Rule 9(1)(ii) of the Rules.

(ii) Secondly learned counsel states that even the relaxation granted to respondent No.4 is bad as relaxation can only be granted with respect to a "class or category of persons" and not in the case of an individual. He further states that no reasons have been recorded as to why relaxation has been granted in the present case. Therefore, he submits that action of the respondent-State in relaxing the provisions of Rule 9(1)(a)(ii) is illegal and cannot be sustained.

(iii) Thirdly learned counsel submits that under Rule 9 appointment by way of transfer can be made only if there is no eligible employee available for being considered for promotion.

(iv) Lastly learned counsel submitted that even if it is presumed that respondent No.4 was eligible or that relaxation made in his case is valid thereby making him eligible for the post and the post was to be filled up by way of transfer, it was incumbent upon the State to circulate the post amongst all eligible employees and to seek applications from other eligible employees who may wish

to be appointed by way of transfer. It is the contention that the appointment of respondent No.4 made on the basis of a single application submitted by him without circulating the post or publishing the same in any manner whatsoever amongst other eligible employees is nothing but a back door appointment made in violation of Articles 14 and 16 of the Constitution of India. The appointment is therefore liable to be declared illegal on this ground alone.

On the other hand, learned counsel for the State as also for respondent No.4 have contended that firstly the petitioner was himself not eligible for appointment to the post by way of promotion as he did not fulfill the requisite experience and thus has no locus standi to file the present petition. It has further been stated that appointment was made by the Government on a consideration of the application submitted by respondent No.4. Relaxation was accorded at the level of the Financial Commissioner and Secretary to Government of Haryana with the approval of the Chief Minister, Haryana after noticing that no departmental official fulfills the qualification for the post of Deputy Director. It was further noted that the post of Deputy Director was lying vacant for some time and therefore respondent No.4 who had an excellent record of service could be appointed in relaxation of the Rules. Thus, it is contended that appointment is legal and valid and the writ petition is liable to be dismissed.

I find no merit in the contention of the respondents that the petitioner has no locus standi to file the writ petition. This is for the reason that firstly the petitioner has claimed a writ of quo-warranto. In this situation if the Court finds that the appointment of respondent No.4 is illegal being against the statutory Rules or Articles 14 and 16 of the Constitution of India, the same can be set aside on a petition filed by any individual. Still further the petitioner has pleaded that earlier also promotions were made to the post of Deputy Director in relaxation of the requirement of five years experience and thus the petitioner had a claim for promotion which was denied. Thus, I am not inclined to dismiss this writ petition

on the ground that the petitioner has no locus standi to file the same.

On merits, I am of the opinion that the present writ petition deserves to be allowed on the sole ground that appointment of respondent No.4 on the basis of a single application submitted by him and without considering the claim of other employees working in the State of Haryana or in other States or in the Government of India is an illegal appointment. The same was made without considering the competing claims of others who were eligible and desirous of being considered. Such an entry into service is against Articles 14 and 16 of the Constitution of India. I am of the opinion that even if the appointment was to be made by transfer the same should have been done after circulating the requirement and conditions of eligibility in various departments of the State of Haryana, Government of India and an intimation should have been sent to other States as well. It is thereafter that the appointment should have been made after considering the competing claims of all others who would have applied. The present appointment having been made without circulating the post is illegal. For this view I am fortified by the observations made by a Division Bench of this Court in **Fateh Singh v. State of Haryana and others**, 2006(3) SCT 836. The relevant observations are as hereunder:-

> "2. After hearing the learned counsel for the petitioner and in view judgment of a Constitution Bench of the Hon'ble Supreme Court in the case of **Secretary, State of Karnataka & others v. Umadevi & others**, 2006(2) SCT 462: (2006)4 SCC 1, wherein it has been laid down that procedure for making appointment to a public office has to be followed, which is considered to be basic structure of the Constitution, the petition is liable to be dismissed.
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> In other words, it is mandatory that the posts are advertised by the competent authority/the State or authorized selection body. After considering all the competing claims in accordance with the criteria

> which answers the requirement of Articles 14 and 16(1) of the Constitution, the candidates are required to be selected and then appointed to the post. Any entry into service by a method contrary to the provisions of Articles 14 and 16(1) of the Constitution have been considered to be illegal as is evident from the perusal of paras 15 and 53 of the judgment. ....."

In fact in a recent judgment in the case of **Arun Kumar Nayak v. Union of India & Ors.**, JT 2006(12) SC 372 the Hon'ble Supreme Court has held that public appointments should be made after publicity and giving the opportunity to all eligible. The Hon'ble Supreme Court held that making appointments after merely inviting applications from Employment Exchange is not sufficient and the posts should be advertised as well in addition to inviting names from the Employment Exchange. The relevant observations of the Hon'ble Supreme Court are as hereunder:-

> ".....The High Court upset the reasoning of the Tribunal by relying on the decision of this Court in **Union of India v. N.Hargopal**, where it has been held that the Government instructions enjoying the field of choice should in the first instance, be restricted to candidates sponsored by the Employment Exchanges, and the same was upheld as not offending Articles 14 and 16 of the Constitution. The High Court has also relied on the decision of this Court in the case of **Delhi Development Horticulture Employees" Union v. Delhi Administration, Delhi,** where this Court approved the recruitment through Employment Exchanges as a method of preventing malpractices. Subsequent decisions of this Court rendered in **Excise Supdt. Malkapatnam v. K.B.N.Visweshwara Rao,** wherein **Hargopal** (supra) was considered and distinguished, as placed before the Division Bench of the High Court but the High Court brushed it

aside by observing that it was distinguishable on the basis of special facts of that case.

8. In **Visweshwara Rao** (supra) a three Judge Bench of this Court after considering **Hargopal** (supra) held in paragraph 6 as under:-

> "Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fair play, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the Employment Exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the Employment Exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the Employment Exchange, and Employment Exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins, and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

9. This Court in **Viweshwara Rao** (supra), therefore, held that intimation to the Employment Exchange about the vacancy and candidates sponsored from the Employment Exchange is mandatory. This Court also held that in addition and consistent with the principle

> of fair play, justice and equal opportunity, the appropriate department or establishment should also call for the names by publication in the newspapers having wider circulation, announcement on radio, television and employment news bulletins and consider all the candidates who have applied. This view was taken to afford equal opportunity to all the eligible candidates in the matter of employment. The rationale behind such direction is also consistent with the sound public policy that wider the opportunity of the notice of vacancy by wider publication in the newspapers, radio, television and employment news bulletin, the better candidates with better qualifications are attracted, so that adequate choices are made available and the best candidates would be selected and appointed to subserve the public interest better."

The aforesaid view was taken to afford equal opportunity to all eligible candidates in the matter of appointment. Since the appointment of respondent No.4 was made without circulating the post to any department of either the State Government or the Central Government and on the basis of a single application submitted by him, the same is held to be illegal. Orders Annexures P7 and P8 as also subsequent order attached as Annexure R12 with the written statement filed by respondent No.4 are quashed.

In this view of the matter I need not examine the other contentions raised by learned counsel for the petitioner in this writ petition. It may, however, be mentioned that by this time the petitioner has also become eligible for being promoted as he has completed five years service. Respondents 1 and 2 are therefore directed to take a fresh decision for recruitment to the post of Deputy Director under Rule 9 of the Rules. Let the decision be taken within a period of three months from the date of receipt of a certified copy of this judgment.

The writ petition is allowed in the aforesaid terms. There shall, however, be no order as to costs.

(P.S.PATWALIA)
November 02, 2006. **JUDGE**

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